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### Detailed Information

**Permitting Authority: NNEPA**

**County:** San Juan

**State:** New Mexico

**AFS Plant ID:** 35-045-NVA02

**Facility:** Four Corners Steam Electric Station

**Document Type:** RESPONSE TO COMMENTS

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## RESPONSES TO COMMENTS

### on the Draft Part 71 Permit Renewal to Operate Four Corners Steam Electric Station

#### Permit No. NN-OP-15-07

On October 12, 2015, the Navajo Nation Environmental Protection Agency (NNEPA) had a notice published in the {Newspaper Name}, {State} *[please provide all the newspapers where public notice was published]* stating that Four Corners Steam Electric Station (FCPP), located at the end of San Juan County Road 6675, Fruitland, New Mexico, had applied for a Part 71 Operating Permit renewal to operate a coal-fired power plant. The notice stated that NNEPA proposed to issue an operating permit and the associated acid rain permit for this source and provided information on how the public could review the proposed permit and other documentation. This notice also includes the information for a public informational session and a public hearing, which occurred on November 19, 2015 at the Nenahnezad Chapter House, Fruitland, New Mexico. Finally, the notice informed interested parties must submit comments on the draft Part 71 permit or the draft Acid Rain permit by December 4, 2015.

NNEPA received comments on the draft Part 71 permit from FCPP [Comments 1 and 2] on November 19, 2015, from Mr. Vincent H. Yazzie [Comment 3] on December 4, 2015, and from Mr. John Barth, on behalf of San Juan Citizens Alliance (“SJCA”) and Dine’ Citizens Against Ruining Our Environment (Dine’ C.A.R.E) (collectively, the “Conservation Organizations”) [Comments 4 through 9] on December 4, 2015. This Response to Comment document provides responses to all of these comments. When permit language is included in the response, bolded language indicates additions to the permit and language with a line through it has been deleted from the permit.

**Comment 1:**

FCPP requested to make the following changes to the unit descriptions for boilers B4 and B5 to reflect the current continuous emission monitoring systems (CEMS) installed with boilers B4 and B5:

One (1) pulverized coal-fired boiler, combusting natural gas for unit start-up and flame stabilization. B4 also burns a small amount of used oil for energy recovery during the combustion of coal. Stack S-4 is equipped with SO<sub>2</sub>, NO<sub>x</sub>, **Diluent**, CO<sub>2</sub> CEMS, **Hg CEMS**, **Stack flow CEMS** and a COMs. Hg CEM is planned to be installed by 4/16/2016.

**Response to Comment 1:**

A diluent CEMS could measure CO<sub>2</sub> as well. FCPP has installed Hg CEMS and stack flow CEMS. Therefore, the “Significant Emission Units” table in Section I of the draft permit has been revised as follows as the results of this comment:

Unit ID/ Stack ID	Unit Description	Maximum Capacity	Constructi on Date	Control Method
B4/ Stack S-4	One (1) pulverized coal-fired boiler, combusting natural gas for unit start-up and flame stabilization. B4 also burns a small amount of used oil for energy recovery during the combustion of coal. Stack S-4 is equipped with SO <sub>2</sub> , NO <sub>x</sub> , <b>Diluent, Hg, and Stack Flow</b> and CO <sub>2</sub> CEMS, and a COM. A Hg CEM is planned to be installed by 04/16/16.	8,612 MBtu/hr; 750 MW	1969	Low NO <sub>x</sub> burner B4-4N (1989); Baghouse B4-4B (1983); FGD system B4-4S (1984); Improved SO <sub>2</sub> control efficiency (2005); and Selective Catalytic Reduction (SCR), Dry Sorbent Injection (DSI) system using hydrated lime (2015).
B5/ Stack S-5	One (1) pulverized coal-fired boiler, combusting natural gas for unit start-up and flame stabilization. B5 also burns a small amount of used oil for energy recovery during the combustion of coal. Stack S-5 is equipped with SO <sub>2</sub> , NO <sub>x</sub> , <b>Diluent, Hg, and Stack Flow</b> and CO <sub>2</sub> CEMS, and a COM. A Hg CEM is planned to be installed by 04/16/16.	8,612 MBtu/hr; 750 MW	1970	Low NO <sub>x</sub> burner B5-5N (1991); Baghouse B5-5B (1983); FGD system B5-5S (1984); and Improved SO <sub>2</sub> control efficiency (2005); and Selective Catalytic Reduction (SCR), Dry Sorbent Injection (DSI) system using hydrated lime (2016).
...	...	...	...	...

**Comment 2:**

FCPP stated they may use PM CEMS to demonstrate compliance with the PM emission limit in 40 CFR 63, Subpart UUUUU in the future. Therefore, FCPP requested to make the following changes to Condition II.H.5.a:

PM: Conducting quarterly stack testing **or PM CEMS**.

## Response to Comment 2:

40 CFR 63, Subpart UUUUU allows the affected sources to demonstrate compliance with the PM emission limit by either performing PM emission stack tests quarterly or the use of PM CEMS. Condition II.H.5 has been revised as follows as the result of this comment:

5. The permittee has elected to demonstrate compliance with the emissions limits in Condition II.H.3 using the following methods:
  - a. PM: Conducting quarterly stack testing **or using PM CEMS**.

...

Appendix C of the permit, which includes the applicable 40 CFR 63, Subpart UUUUU requirements for FCPP, has also been revised as follows to allow the use of PM CEMS as one of the compliance method for PM emission limit under Subpart UUUUU:

## I. GENERAL COMPLIANCE REQUIREMENTS

- a. ...
- b. Initial performance testing is required for all pollutants, to demonstrate compliance with the applicable emission limits. [40 CFR § 63.10000(c)(1)]
- ...
- (4) If your coal-fired EGU does not qualify as a LEE for total non-mercury HAP metals, individual non-mercury HAP metals, or filterable particulate matter (PM), you must demonstrate compliance through an initial performance test and you must monitor continuous performance through **either use of a PM CEMS or** compliance performance testing repeated quarterly.

...

## II. TESTING AND INITIAL COMPLIANCE REQUIREMENTS

...

- s. If you use CEMS or sorbent trap monitoring systems to measure a HAP (e.g., Hg or HCl) directly, the first 30-boiler operating day (or, if alternate emissions averaging is used for Hg, the 90-boiler operating day) rolling average emission rate obtained with certified CEMS after the applicable date in §63.9984 (or, if applicable, prior to that date, as described in 40 CFR § 63.10005(b)(2)), expressed in units of the standard, is the initial performance test. Initial compliance is demonstrated if the results of the performance test meet the applicable emission limit in Table 2 to this subpart. [40 CFR § 63.10011(c)(1)]
- t. For a unit that uses a CEMS to measure SO<sub>2</sub> or PM emissions for initial compliance, the first 30 boiler operating day average emission rate obtained with certified CEMS after the applicable date in 40 CFR § 63.9984 (or, if applicable, prior to that date, as described in 40 CFR § 63.10005(b)(2)), expressed in units of the standard, is the initial performance test. Initial

compliance is demonstrated if the results of the performance test meet the applicable SO<sub>2</sub> or filterable PM emission limit in Table 2 to 40 CFR Part 63, Subpart UUUUUU. [40 CFR § 63.10011(c)(2)]

S-U. ...

...

**Table 5 to Subpart UUUUU of Part 63—Performance Testing Requirements**

...

To conduct a performance test for the following pollutant . . .	Using . . .	You must perform the following activities, as applicable to your input- or output-based emission limit . . .	Using <sup>2</sup> . . .
1. Filterable Particulate matter (PM)	Emissions Testing	...	...
	OR		
	PM CEMS	a. Install, certify, operate, and maintain the PM CEMS	Performance Specification 11 at Appendix B to part 60 of this chapter and Procedure 2 at Appendix F to Part 60 of this chapter.
		b. Install, certify, operate, and maintain the diluent gas, flow rate, and/or moisture monitoring systems	Part 75 of this chapter and 40 CFR §§ 63.10010(a), (b), (c), and (d).
		c. Convert hourly emissions concentrations to 30 boiler operating day rolling average lb/MMBtu or lb/MWh emissions rates	Method 19 F-factor methodology at Appendix A-7 to part 60 of this chapter, or calculate using mass emissions rate and electrical output data (see 40 CFR § 63.10007(e)).
4. Mercury (Hg)	...	...	...

**Comment 3:**

Mr. Yazzie submitted four (4) photos from Google Earth of the FCPP and stated the following:

*“4x\_smoke.jpg imagery date is 3/15/15. There is smoke emissions in the boiler area. Also the pipe transferring the emissions to the scrubber is corroding and has heavy repair damage due to hot corrosive acid from nitric and sulfuric acid. Boiler area needs to be inspected and hot emission gas measure locally in the boiler areas inside and out.*

*leaking\_smoke.jpg imagery date is 3/15/15. Same as 4x\_smoke.jpg but zoomed out.*

*leaking\_smoke\_01.jpg imagery date is 3/15/15. Same as leaking\_smoke.jpg with smoke from boilers circled.*

*leaking\_smoke\_02.jpg imagery date is 11/17/2013. Smoke leaking from boilers.*

*British Stainless Steel Association Article: Selection of stainless steels for handling nitric acid (HNO<sub>3</sub>) on Selection of stainless steels for handling nitric acid shows stainless steel can be corroded by hot nitric acid and sulfuric acid.*

*The giant conduits transferring the hot emissions to the scrubbers need to be replaced as smoke is leaking out of the conduit.”*

### **Response to Comment 3:**

The photos from Google Earth are not sufficient evidences for showing FCPP is out of compliance with the applicable opacity or PM emission limits. NNEPA has forwarded this comment and the associated photos to EPA Region 9 Compliance Section. NNEPA will evaluate these photos to determine if further inspection at FCPP is needed. No change has been made to the draft permit as the result of this comment.

### **Comment 4:**

Mr. Barth stated that the Navajo Nation contracted away its right to regulate the FCPP and therefore does not have the authority to issue a Title V permit. Specifically, Mr. Barth stated the following:

“ a. *Waiver of ability to regulate under the Lease.*

*Decades ago, the Navajo Nation contracted away its right to regulate FCPP when it leased the facility to the various FCPP owners and operators. Specifically, in leasing FCPP, the Navajo Nation contracted that the Tribe covenants that it will not directly or indirectly regulate or attempt to regulate the Company or the construction, maintenance or operation of the power plant and transmission system by the Company. The renewed lease agreement does not change this waiver of regulatory jurisdiction. As a result, the Navajo Nation does not have the authority to issue a Title V permit for FCPP because to do so would constitute the direct or indirect regulation of operations of the power plant, and as described further below.*

*The Ninth Circuit has previously held that the language in the lease for the FCPP indicated an “unmistakable waiver” by the Navajo Nation of its right to regulate that facility. Arizona Pub. Serv. Co. v. Aspaas, 77 F.3d 1128, 1130-35 (9th Cir. 1995). The court recognized that “non-regulation covenant” for the FCPP states, “The Tribe covenants that . . . it will not directly or indirectly regulate or attempt to regulate the Company or the construction, maintenance or operation of the power plant and transmission system by the Company . . .” Id. Furthermore, the Salt River Project was recently allowed to proceed in its lawsuit for injunctive relief vis-à-vis Navajo Generating Station regulation, which contains a similar non-regulation covenant. Salt River Project Agric. Improvement & Power Dist., 672 F.3d at 1177. There, the court remanded the case back to the district court, which ordered that the Navajo Nation “may not regulate . . . the operation of NGS.”*

*See Salt River Project Agric. Improvement & Power Dist. v. Lee, No. CV-08-08028-PCT-JAT, 2013 WL 321884, at \*26 (D. Ariz. Jan. 28, 2013).*

*Moreover, and even if the Tribe were to issue a Title V permit, the Navajo Nation's waiver by contract of regulatory jurisdiction over FCPP largely removes the Tribe's power to enforce the permit, if it were violated.*

*For the above reasons, USEPA, not the Navajo Nation, is the proper entity to regulate FCPP and issue the Title V permit to FCPP under 40 C.F.R Part 71.*

*b. The May 2005 Voluntary Compliance Agreement*

*The Draft Title V permit indicates that the permit is being issued pursuant to a May 2005 Voluntary Compliance Agreement ("VCA") between the owners of the FCPP and the Navajo Nation. Draft Title V Permit, pp. 56-57, provision IV.S. See also, Exhibit 1 hereto ("VCA").<sup>1</sup> The VCA and Draft Permit specifically limit the Navajo Nation's ability to enforce the permit, prevent the Navajo Nation from including any provisions that are more stringent than the minimum federal requirements, and otherwise results in a less stringent and less enforceable Title V permit. As such, the EPA must assume responsibility for issuing the FCPP Title V permit.*

*There are numerous provisions in the Draft Title V Permit and VCA that result is a less stringent and less enforceable Title V permit than would be issued by EPA. For example:*

- *The VCA "overrides any principle of deference to the interpretation or administration adopted by government agencies or officers, any principle of interpretation in favor of Indians or Indian tribes, and any other contrary principle of interpretation." Exhibit 1, VCA, page 44, provision 13.13. This provision would not be included in an EPA-issued Title V permit and significantly weakens both the permit itself and the enforcement of the permit by eliminating the deference normally given to EPA and/or the Navajo Nation in interpreting or enforcing provisions of the permit.*
- *The VCA allows the operator to reject a permit issued by the Navajo Nation. EPA-issued permits do not offer a permit applicant the right to reject a permit if it is unhappy with its terms and conditions.*
- *In addition, the following provisions of the VCA are less stringent than the Navajo Nation laws and the Clean Air Act and thus are illegal. Section 5.12 (Administration of Permits), 5.5.2 (Applications For Renewal), and Article 8 (Dispute Resolution) that are not contained in the Navajo Nation laws, and provisions in Article 6 (Permit Content), and Sections 5.11.2 (New or Amended Laws or Regulations), 9.3 (Administrative Penalties), 9.4 (Shutdown Orders), and 9.6 (Citizen Suits).*

*As a result of the VCA, the draft permit does not meet the federal minimum requirements for Title V permits. Therefore, EPA may not approve the permit and instead must issue a compliant Title V permit itself."*

#### **Response to Comment 4:**

Contrary to the commenter's assertion, the Navajo Nation has the proper authority to issue and modify a Title V operating permit for FCPP. In March 2006, the U.S. EPA determined that the Navajo Nation was eligible for Treatment in the Same Manner as a State for purposes of delegation of the administration of a Clean Air Act (CAA) Title V, 40 CFR Part 71 program over FCPP pursuant to CAA § 301(d), 40 CFR Part 49, and via the terms of a Voluntary Compliance Agreement executed in May 2005 between Arizona Public Service Company, on its own behalf and as the operating agent of FCPP, and the Navajo Nation.

#### **Comment 5:**

Mr. Barth stated that the permit is being issued to an improper permittee. Specifically, Mr. Barth stated the following:

*"The Draft Permit is not being issued to a proper Permittee. The Cover Page for the Draft Permit indicates that the "Permittee" is the "Four Corners Steam Electric Station." The Four Corners Steam Electric Station is not a person, corporate entity, owner, or operator of the plant. As such, the Navajo Nation may not issue a permit to the Four Corners Steam Electric Station. Instead, the Title V permit should be each and every owner/operator of the Four Corners Steam Electric Station and each should be jointly and severally responsible for compliance with all provisions of a Title V permit. 40 C.F.R. §71.5(a)(Title V permit applications must be submitted by "owners or operator" and thus must be issued to the same).*

*A review of EPA Region 9's Draft Acid Rain permit highlights this deficiency with the Draft Title V Permit. EPA's Draft Acid Rain Permit specifically identifies Arizona Public Service (APS), the operator the FCPP, as the Permittee, not the power plant itself. Thus, if EPA's Acid Rain Permit is violated, an enforcement action can proceed against the corporate operator. In contrast, the Title V permit is unenforceable as currently written because the power plant itself is not an individual or corporate entity that is subject to suit. Thus, it is unenforceable in a court of law. As written, the Draft Title V permit not only impairs the ability of EPA and/or the Navajo Nation to enforce the permit, but also impairs the ability of citizen enforcement. As such, the Draft Title V Permit must be amended to clearly identify as the "Permittee" an individual(s) and/or corporate owner/operator as the FCPP that is subject to suit and enforcement."*

#### **Response to Comment 5:**

<Insert the responses from NNEPA's attorney>

#### **Comment 6:**

Mr. Barth stated that the startup, shutdown, and malfunction exemptions are not legal nor technically justified and are contrary to applicable requirements. Specifically, Mr. Barth stated the following:

*“The draft Title V permit contains exemptions from compliance during periods of startup, shutdown, and malfunction. See condition II.A.1. of the draft permit. These exemptions are illegal and/or overbroad and must be removed from the permit or significantly limited.*

*The draft Title V permit contains exemptions from opacity and particulate limits during periods of “start up” and “shut down.” See condition II.A.6.b of the draft permit. The definition of “shutdown” allows an exemption from emission limits when any unit “drops below 300 MW net load with the intent to remove the unit from service.” Condition II.A.1.k. The definition of “start up” allows an exemption from emission limits from the moment of initial start up until “the unit reaches 400 MW net load.” Condition II.A.1.l.*

*The draft Title V permit also contains an exemption from opacity compliance during “saturated stack conditions.” Condition II.A.3. The term “saturated stack conditions” is largely undefined except a parenthetical vaguely defining it as “condensed water vapor”. Id. Under this provision, FCPP is exempt from complying with opacity limits provided the “baghouse is not fully closed.” Id. This broad opacity exemption would allow unlimited opacity emission as long as a single section of the baghouse remains open, while all other sections are closed. This exemption is arbitrary and capricious because it is vaguely defined and inconsistent with minimum federal requirements. In addition, since Units 4 & 5 utilize wet scrubbers for SO<sub>2</sub> control, the operator could claim that “condensed water vapor” exists any time the wet scrubbers are operated, thus allowing an broad exemption from opacity limits. Further, this exemption is inconsistent with the federal regulations. The federal regulations only exclude “uncombined water droplets” from the definition of opacity. Condition II.A.2.c. The “saturated stack condition” exemption in the draft permit is much broader because it is not limited to “uncombined” water vapor and thus even excludes water droplets that are combined with particulate matter. This provision must be removed from the permit because it interferes with the right of the public to ensure continuous compliance with opacity emission limits. Alternatively, the provision should be limited to “uncombined” water droplets in which case the language should be amended to place the burden on the operator to prove that uncombined water droplets are the source of any interference with the COMs each time the operator asserts this defense to compliance with opacity limits.*

*The draft Title V permit also contains an affirmative defense from exceedances of all emission limits due to any “malfunction.” See condition II.A.6.c of the draft permit. As written, FCPP would be entitled to the “malfunction” exemption by operation of law if the plant is able to produce certain paperwork (“it shall be an affirmative defense in an enforcement action seeking penalties if the permittee has met with all of the following conditions...”).*

*Inclusion of these blanket “startup,” “shutdown,” and “malfunction” (“SSM”) exemptions in the draft Title V permit is inappropriate. Blanket SSM provisions are illegal and should be removed from Title V permits. See Sierra Club v. EPA, 551 F.3d 1019 (D.C. Cir. 2008)(in the context of Clean Air Act Section 112).*

*As noted above, we are requesting that additional terms and conditions be added to, and deleted from, the Title V permit related to SSM provisions. NNEPA may not add or delete the terms and conditions requested herein because to do so would constitute a breach of the leasing provision stating that the Navajo Nation may not directly or indirectly regulate or attempt to regulate the*

*operation of the Four Corners Power Plant and may not include more stringent requirements. As such, USEPA must issue this FCPP Title V permit, not NNEPA.”*

#### **Response to Comment 6:**

Conditions II.A.1.k, II.A.1.1, II.A.2.c, II.A.3, II.A.6.b, and II.A.6.c of the draft Title V permit incorporates the requirement specified in 40 CFR §§ 49.5512(c)(12), 49.5512(c)(12), 49.5512(d)(4), 49.5512(e), 49.5512(h)(2), and 49.5512(h)(3), respectively. These are part of the source specific FIP requirements for FCPP. A Title V operating permit must include all applicable federal requirements that are applicable to NGS. NNEPA does not has authorities to revise federal requirements specified in the FIP since they were promulgated by U.S. EPA. Comments related to the FIP requirements for FCPP requirements shall be submitted to U.S. EPA directly and will not be addressed in this operating permit renewal action. Therefore, no change has been to the draft permit as the result of this comment. As stated in the response to Comment 4, NNEPA does has the authority to regulate and issue the operating permit for FCPP.

#### **Comment 7:**

Mr. Barth stated that the draft Title V permit fail to require sufficient periodic monitoring. Specifically, Mr. Barth stated the following:

*“Permitting authorities must ensure that a Title V permit contain monitoring that assures compliance with the terms and conditions of the permit. See 42 U.S.C. § 7661c(c) and 70.6(c)(1). Although as a basic matter, Title V permits must require sufficient periodic monitoring when the underlying applicable requirements do not require monitoring (see 40 CFR § 70.6(a)(3)(i)(B)), the D.C. Circuit Court of Appeals has firmly held that even when the underlying applicable requirements require monitoring, permitting authorities must supplement this monitoring if it is inadequate to ensure compliance with the terms and conditions of the permit. As the D.C. Circuit recently explained, 40 CFR § 70.6(c)(1) serves as a gap-filler. In other words, § 70.6(c)(1) ensures that all Title V permits include monitoring requirements “sufficient to assure compliance with the terms and conditions of the permit,” even when § 70.6(a)(3)(i)(A) and § 70.6(a)(3)(i)(B) are not applicable. This reading requires a permitting authority to supplement an inadequate monitoring requirement so that the requirement will “assure compliance with the permit terms and conditions.” See Sierra Club v. EPA, 536 F.3d 673, 680 (D.C. Cir. 2008). In other words, “a monitoring requirement insufficient ‘to assure compliance’ with emission limits has no place in a permit[.]” Id. at 677.*

*For the reasons described above, the draft Title V permit fails to contain emission limits or monitoring requirements that ensure compliance with underlying opacity, particulate matter and other emission limits due to the deficiencies with the startup, shutdown, and malfunction exemptions.*

*Especially in light of the troubling exemptions for opacity (which is a surrogate for particulate matter), the draft permit must also include enforceable language mandating installation and operation of continuous monitoring of PM to ensure continuous compliance with these emission limits. PM CEMs are also important to ensure compliance with the Mercury and Air Toxics requirements that use PM emission monitoring as a surrogate for some air toxics.*

*As noted above, we are requesting that addition terms and conditions be added to, and deleted from, the Title V permit. NNEPA may not add or delete the terms and conditions requested herein because to do so would constitute a breach of the leasing provision stating that the Navajo Nation may not directly or indirectly regulate or attempt to regulate the operation of the FCPP and because the Nation may not add more stringent requirements. As such, EPA must issue this FCPP Title V permit, not NNEPA.”*

#### **Response to Comment 7:**

Currently, compliance with the opacity limit for FCPP is through the use COMS at FCPP and compliance with the PM emission limit is demonstrate by implementing the CAM plan specified in Condition II.D. FCPP does plan to install PM CEMS in the future. However, the use of PM CEMS is not mandatory under 40 CFR 63, Subpart UUUUU (MATS). Therefore, NNEPA does not have the authority to mandate FCPP to install and operate PM CEMS to demonstrate compliance with the PM emission limits under FIP or MATS rule. No change has been to the draft permit as the result of this comment. As stated in the response to Comment 4, NNEPA does has the authority to regulate and issue the operating permit for FCPP.

#### **Comment 8:**

Mr. Barth stated that the CAM plan in the draft permit is insufficient and instead the draft permit must contain enforceable requirements for installing and operating PM CEMS to ensure continuous compliance. Specifically, Mr. Barth stated the following:

*“The Title V permit fails to contain enforceable provisions for installation and operation of PM CEMs to establish continuous compliance with both the PM emission limit and the Mercury and Air Toxics Standards (“MATS”) requirements.*

*The draft Title V permit allows the operator to demonstrate continuous compliance with particulate limits by using a compliance assurance monitoring plan. Condition II.D. We object to the CAM plan provisions of the Title V permit. First, there is little technical support for the findings of the CAM plan. The draft permit’s CAM plan does not meet the requirements of the Title V program because it does not provide sufficiently reliable information for determining compliance. 42 U.S.C. § 7661c(b). For example, the CAM plan largely relies on opacity readings as a surrogate for PM emissions. However, as noted above, there are broad illegal exemptions from opacity exceedences and monitoring, especially during saturated stack conditions. The CAM plan also requires a baghouse bag leak detection system. However, this CAM requirement is negated by the saturated stack condition exemption that allows all but one baghouse section to be closed, thus negating the effectiveness of such a system. Finally, the CAM plan is overly vague and does not prove that implementation of the CAM plan will assure continuous with PM and MATs emission limits.*

*Given the significant deficiencies identified above with the proposed CAM plan, FCPP must instead install a particulate matter continuous emission monitoring system (PM CEMs) to continuously measure and report particulate matter regulated in the FCPP Title V permit. The Clean Air Act Title V program requires stationary sources, such as FCPP, to prove*

*continuous compliance with its emission limits, such as particulate matter. See, 42 U.S.C. § 7661c; 40 C.F.R. 70 et seq.; and, 40 C.F.R. Part 64 et seq. FCPP must comply with this requirement by installing, operating, and reporting the results particulate emissions through the use of PM CEMs. EPA has recognized that PM CEMs have been installed and operated at numerous coal plants in the United States. Exhibit 2, p.3 (Wygen Plant) and Exhibit 3, hereto (Burns and MacDonald Report). Another example of a coal with PM CEMs is the Sibley power plant. See Exhibit 4 hereto. In addition, the Navajo Generating Station, also located on the Navajo Nation, is being required to install and operate PM CEMs. We request that FCPP also be required to install and operate use PM CEMs.*

*As noted above, we are requesting that addition terms and conditions be added to, and deleted from, the Title V permit. NNEPA may not add or delete the terms and conditions requested herein because to do so would constitute a breach of the leasing provision stating that the Navajo Nation may not directly or indirectly regulate or attempt to regulate the operation of the FCPP and would require imposition of more stringent conditions. As such, USEPA must issue this FCPP Title V permit, not NNEPA.”*

#### **Response to Comment 8:**

As stated in the response to Comment 7, NNEPA does not have the authority to mandate FCPP to install and operate PM CEMS to demonstrate compliance with the PM emission limits under FIP (0.05 lb/MMBtu) or MATS rule (0.03 lb/MMBtu). NNEPA believes the CAM plan included in Condition II.D is sufficient to demonstrate continuous compliance with the PM emission limit under FIP. In addition, the source will be required to perform quarterly PM emission tests or the installation and operation of PM CEMS after April 16, 2016, the compliance date for MATS rule. The quarterly PM stack test results will be used to confirm compliance with the less stringent PM emission limit of 0.05 lb/MMBtu under FIP. No change has been to the draft permit as the result of this comment. As stated in the response to Comment 4, NNEPA does has the authority to regulate and issue the operating permit for FCPP.

#### **Comment 9:**

Mr. Barth stated that the finding of “no jeopardy” to threatened and endangered species is arbitrary and capricious. Specifically, Mr. Barth stated the following:

*“Paragraph 6 of the Draft Statement of Basis for the Draft Title V Permit correctly states that under Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, and its implementing regulations at 50 CFR Part 402, USEPA is required to ensure that any action authorized, funded, or carried out by USEPA is not likely to jeopardize the continued existence of any Federally-listed endangered species or threatened species or result in the destruction or adverse modification of such species’ designated critical habitat. The Navajo Nation and EPA claim that the Title V permit and Acid Rain Permit will have no effect on listed species or their critical habitat because these permits “do not authorize the construction of new emission units or emission increases from existing units, nor does it otherwise authorize any other physical modifications to the facility or its operations.” Draft Statement of Basis, §6. However, the issuance of these permits will allow the FCPP to continue to operate for at least 5 more years or until these permits are again renewed. As will be discussed*

*below and in the attached Exhibit 5 hereto, the continued operation of the FCPP (and related Navajo Mine) are jeopardizing the continued existence of Federally-listed endangered species. Moreover, the Navajo Nation and EPA's ESA Section 7 analysis is arbitrary and capricious because it is limited only to "the construction of new emission units or emission increases from existing units" and failed to assess the impacts allowing the continued operation of the FCPP that will result from the re-issuance of the Title V and Acid Rain permits.*

*The San Juan River adjacent to the FCPP and Navajo Mine serves as critical habitat for the Colorado pikeminnow (CPM) and razorback sucker (RBS). The primary constituent elements of critical habitat for these species include a quantity of water of sufficient quality (i.e., temperature, dissolved oxygen, lack of contaminants, turbidity, etc.) that is delivered to a specific location in accordance with a hydrologic regime that is required for the particular life stage for the species. The existing populations of these species in the San Juan River exist due to a stocking program, without which the species would likely extirpated from the River.*

*The US Fish and Wildlife Service ("Service") prepared a 2015 BiOp for the continued operation of the Four Corners Power Plant (FCPP) and Navajo Mine Energy Project (NMEP) for 25 more years, from 2016 to 2041. The Draft Title V and Acid Rain permits would allow the continued operation of the FCPP, without which the plant could not legally operate. The 2015 BiOp addressed the Navajo mine expansion of 5,568 acres into Area IV North and Area IV South of the mine lease area, which would allow it to produce 5.8 million tons of coal for 25 years. In addition, FCPP would continue to operate Units 4 and 5 (following the 2013 closure of Units 1-3), with a capacity of 1500 MW. Units 4 and 5 emit 149 lbs. of mercury (Hg) and 523 lbs. of selenium (Se) annually. The power plant has a right to withdraw 51,600 acre-feet per year (af/yr) and typically uses about 27,500 af/yr of water from the San Juan River. The water is withdrawn via two 8 by 8.5 foot screened intake bays located just above a gated weir (the "APS weir"). The weir dams water to assure adequate water coverage of the intake bays. Water drawn from the San Juan River is stored in the man-made Morgan Lake adjacent to the power plant. The Service's 2015 BiOp determined that the following aspects of the project would adversely affect CPM and RBS and their critical habitat: water withdrawals from the San Juan River, water pollution discharges from NMEP, entrainment of young fish in the FCPP intake pipes, operation of the APS weir, release of non-native fish from Morgan Lake, Hg deposition and bioaccumulation (but not RBS critical habitat), and Se deposition.*

*As part of the project, the action agencies and project proponents developed a suite of "conservation measures" intended to reduce impacts to CPM and RBS. The conservation measures required the action agencies to consult with the Service on discretionary actions that may result in Hg deposition and required project proponents to develop a plan to reduce entrainment from cooling water intakes, develop a plan to reduce the risk of non-native species escaping from Morgan Lake, partially fund fish passage at the APS weir, and provide additional funding for various studies, monitoring, and additional fish stocking. The BiOp subsequently adopted these conservation measures as binding reasonable and prudent measures (RPMs) with associated terms and conditions (T&Cs).*

*Ultimately, the 2015 BiOp determined that 25 more years of operations at FCPP and NMEP, along with cumulative effects and the environmental baseline, would not jeopardize CPM or RBS or adversely modify their critical habitat. The Service made clear that its conclusion was premised*

*largely on the belief that the stocking efforts and the conservation measures would “offset the adverse effects which would otherwise occur as a result of the proposed action when considered in relation to the environmental baseline, and cumulative effects.”*

*Various Conservation organizations submitted comment letters on the Service’s ESA analysis. Exhibit 5 hereto is one such ESA comment letter, which is incorporated herein by reference. In addition, to the extent that the Navajo Nation and EPA intend to incorporate by reference (or tier) to the 2015 BiOp, we note the following deficiencies with the Service’s analysis. First, the BiOp does not adequately consider recovery needs of the species in its no jeopardy and no adverse modification analyses. Second, there is no analysis in the BiOp discussing how the conservation measures will offset the project’s adverse impacts. Third, the no jeopardy determination hinged on the determination that the restocking program is offsetting the mercury effects and, in combination with the Conservation Measures, will continue to do so. The problem with this analysis is that the stocking programs for CPM and RBS are not intended to be permanent and are not currently planned to continue through the life of the proposed project, or even the next 5-7 years (which is the normal lifetime of the proposed Title V permit). The CPM augmentation plan is only projected to continue through 2020. The RBS augmentation plan is currently only continuing through 2016. Fourth, the Service misapplied its regulations by finding that its regulations (USFWS 1986) only allows cumulative assessment analyses until the end of the project, which is 2041. Therefore, the Service arbitrarily ignored cumulative effects after 2041. Fifth, the 2015 BiOp illegally excluded the dramatic projected impacts of climate change from its jeopardy and critical habitat analyses. Sixth, the Service’s environmental baseline analysis was faulty because it fails to adequately consider the affects of additional selenium loading in the San Juan River caused by the Navajo Indian Irrigation Project (“NIIP”). Seventh, there is little or no discussion of impingement impacts in the BiOp’s discussion of the effects of the project and there is no discussion of impingement impacts in the BiOp’s jeopardy or critical habitat analyses. For these reasons, as well as those described in Exhibit 5 hereto, the 2015 BiOp is technically and legally deficient and cannot be used to justify the Navajo Nation/EPA’s “no jeopardy”/ “no adverse modification” finding for these permits.”*

#### **Response to Comment 9:**

As stated in the Statement of Basis for this draft permit, this permit does not authorize the construction of new emission units or emission increases from existing units. In addition, the 2015 BiOp, prepared by US Fish and Wildlife Service, has determined that 25 more years of operations at FCPP would not jeopardize CPM or PBS or adversely modify their critical habitat. Therefore, NNEPA has concluded that the issuance of this permit will have no effect on listed species or their critical habitat. Comments related to the 2015 BiOp should be directed to US Fish and Wildlife Service and will not be responded in this operating permit renewal action. Therefore, no change has been to the draft permit as the result of this comment.

#### **Additional Changes Made by NNEPA:**

On May 1, 2015, the D.C. Courts of Appeals vacated the EPA emission standard exemptions for emergency reciprocating internal combustion engines (RICE) that operate up to 100 hours a year for “emergency demand response” (*Delaware Dept. of Nat. Resources and Envtl. Control v. EPA*). This exemption is currently specified in 40 CFR § 63.6640(f)(2) (NEHAP, Subpart ZZZZ) and 40 CFR

§§ 60.4211(f)(2) and 60.4243(d)(2) (NSPS, Subparts IIII and JJJJ). Post-decision motions are currently unresolved but may impact Condition II.J.5.b (part of the NESHAP, Subpart ZZZZ requirements) of the draft permit. NNEPA has added a note to Condition II.J.5.b as follows to record this court decision:

**II.J. NESHAP for Stationary Reciprocating Internal Combustion Engines, 40 CFR Part 63, Subpart ZZZZ Requirements**

....

5. The operation hours for each of the diesel fire pumps (EU52a and EU52b) and the emergency generator (EU52c) shall be limited to the following [40 CFR § 63.6640(f)]:

- a. ...

- b. A maximum of 100 hours per calendar year for maintenance/testing and emergency demand response as specified below and for non-emergency situations specified in Condition II.J.5.c:

- ...

*[Note: On May 1, 2015, the D.C. Courts of Appeals vacated the EPA emission standard exemptions for emergency reciprocating internal combustion engines that operate up to 100 hours a year for “emergency demand response” (Delaware Dept. of Nat. Resources and Env’tl. Control v. EPA). Post-decision motions are currently unresolved but may impact the implementation of this condition.]*